No. 92-1298

In The

Supreme Court of the United States

October Term, 1992

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
OFFICERS FOR JUSTICE, et al.,
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petition challenges a decision by the Ninth Circuit upholding the use of a "sliding band" by the City and County of San Francisco ("City"). The City proposed to use the sliding band to make certain promotions within the San Francisco Police Department. The sliding band permitted the Police Department to consider the experience, training, disciplinary record and minority status of each candidate whose promotional test score fell within a precisely defined, narrow numerical range. This process enabled the City to make some moderate progress toward satisfying the goals of a consent decree and ending twenty years of federal litigation.

The sliding band affords greater precision for the use of test scores than other methods previously approved by courts. Rather than arbitrarily grouping numerical scores into a level or grade from which candidates may be chosen, the sliding band arranges scores based on the standard concept of statistical significance. The sliding band ensures that no candidate will be passed over in favor of another whose test score is lower by a statistically significant factor.

The sliding band permits measured and limited use of affirmative action to overcome the discriminatory patterns of past practices. The district court's opinion, which allows race or gender to be used as one of several factors in choosing among candidates whose scores show no reliable difference in their qualifications, rests on sound scientific principles and extensive expert testimony. No reported decision of this or any other court implies that

an employer must hire strictly in accordance with the numerical order of test scores.

Contrary to petitioner's assertion, the Ninth Circuit's opinion is limited to the unique circumstances of this litigation. The petition, however, fails to present an accurate account of the facts justifying the City's proposal.

1. The Consent Decree.

In 1979, the district court approved a consent decree ("Consent Decree" or "Decree") ending years of bitter litigation over the hiring and promotional procedures of the San Francisco Police Department ("SFPD"). The trial court's decision was affirmed by the Ninth Circuit in 1982, and this Court denied a petition for writ of certiorari in 1983. *Officers for Justice v. Civil Service Comm'n*, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

The Decree settled two federal actions. In 1973, a group of minority and female police officers called Officers for Justice ("OFJ") joined several individuals and organizations to file a suit against the City alleging racial and sexual discrimination in the Police Department. Shortly thereafter, the petitioner, the San Francisco Police Officers Association ("POA"), intervened as a defendant. In 1977, the United States filed a separate suit alleging discrimination in the Department, and in early 1978 the two actions were consolidated.

As noted by the Ninth Circuit in its opinion affirming the Decree, the plaintiffs presented a "forceful statistical demonstration" of *prima facie* discrimination:

> [Minorities and women] appeared to be vastly underrepresented in the upper ranks of the department. Moreover, minorities and women appeared to be concentrated in certain units, bureaus, and subdivisions in the department, while virtually absent in others. Plaintiffs claimed these discrepancies resulted primarily from the use of unvalidated written examinations and various other class-biased screening and selection devices.

Id. 688 F.2d at 618-19.

After the district court issued preliminary orders enjoining certain employment practices, the consolidated actions proceeded to trial in November, 1978. 473 F.Supp. at 804. After two weeks of trial, the parties initiated settlement discussions that resulted in the Consent Decree. *Id.* Following a fairness hearing, the district court approved the Decree in March 1979.

The Consent Decree contains a general prohibition against "any practice which has the purpose or effect of unlawfully discriminating against any employee [or applicant for employment] because of such individual's race, sex or national origin." 473 F.Supp. at 811. By its terms, however, the Decree "provides for specific, definable and good faith efforts to be made [by the City] to achieve certain goals for employment of women and minorities . . . within specified periods of time." *Id.* at 810. These goals apply to hiring and promotional practices:

> In order to eradicate the present effects of past hiring and promotion practices with respect to minorities and women, the City shall adopt and

> seek to achieve as a long-term goal the recruitment, appointment and promotion of qualified minorities and women in sufficient numbers so as to increase substantially the minority and female composition of the San Francisco Police Department so that it more nearly reflects the racial, ethnic and sexual composition of the relevant labor force of the City and County of San Francisco.

Id. at 813.

The Decree establishes a long-term goal of raising to 45% the minority representation in the Department. The Decree also sets annual entry level goals of filling 50% of all vacancies with minorities and 20% of all vacancies with women. *Id.* For each of the promotional ranks of assistant inspector, sergeant, lieutenant, and captain, the Decree establishes a goal of appointing minorities and women in proportion to their representation in the qualified applicant pool. *Id.* at 814-15. The Decree provides that the use of an examination will not justify the failure to meet a goal unless the examination is shown to be valid under the *Uniform Guidelines On Employee Selection Procedures*, 29 C.F.R. 1607 ("*Uniform Guidelines*"). *Id.* at 813.

The Decree provides that it will continue in full force and effect for a period of ten years from its date of approval. *Id.* at 820. However, due to the prolonged delays caused by the litigation discussed below, the City could not seek an order of dismissal when the Decree was scheduled to expire in 1989. Thus, four years after its scheduled termination, the Decree continues to govern the employment practices of the SFPD.

2. Prior Litigation Over Promotions.

The instant petition concerns promotions to the ranks of Q-35 Assistant Inspector ("Assistant Inspector") and Q-50 Sergeant ("Sergeant"), the first promotional ranks above entry level police officer.[1] Appointment to these ranks have been the subject of federal litigation for two decades.

In 1973, shortly after the OFJ filed suit the district court found that the 1971 Sergeant examination had a disparate impact on minorities. The court ordered the City to appoint one qualified minority from the examination list to the rank of Sergeant for every nonminority selected. *Officers For Justice v. Civil Service Comm'n*, 371 F.Supp. 1328, 1342 (N.D. Cal. 1973).

In 1977, the district court extended its order requiring "one for one" permanent promotions to the temporary promotions of individuals to the rank of Sergeant. *Officers for Justice v. Civil Service Comm'n*, 14 Empl. Prac. Dec. (CCH) ¶7548 (N.D. Cal. 1977). The district court also enjoined the City from making appointments from the results of the 1976 Assistant Inspector examination because the plaintiffs had raised serious questions

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[1] In the SFPD promotions to the ranks of Sergeant and Assistant Inspector are made from the entry level rank of police officer. Assistant Inspectors become Inspectors after completion of two years in the rank. A person may hold dual rank. Thus, an individual who is currently a Sergeant may compete for appointment to the rank of Assistant Inspector, and an Inspector may compete for the rank of Sergeant. Persons who achieve a dual rank are referred to as Sergeant or Inspector depending on their assignment to patrol or investigative duties.

regarding the adverse impact of that test against minorities. *Officers for Justice v. Civil Service Comm'n*, 14 Empl. Prac. Dec. (CCH) ¶7549 (N.D. Cal. 1977).

The early challenges to examination procedures were resolved through the settlement that resulted in the Consent Decree. The Decree sets forth the following specific goals:

> [T]he City shall, subject to the availability of qualified minority and female applicants, adopt and seek to achieve an annual goal of selecting minorities and women for promotion to permanent Sergeant and Assistant Inspector positions in proportion to their representation in the qualified applicant pool for each examination.

473 F.Supp. at 815. The Decree provides that the City may not justify a failure to meet the above goal "unless the [selection] procedure or examination is shown to be valid under the *Uniform Guidelines.*" *Id.* at 813.

By an order dated October 1, 1979, the District Court directed the City to establish a "Consent Decree Unit" to administer and coordinate the City's obligations under the Decree. In consultation with the court-appointed "Auditor-Monitor," the Consent Decree Unit was charged with developing and administering examinations to meet the Decree's specific requirements.

Under the direction of the Consent Decree Unit, the City administered Sergeant and Assistant Inspector examinations in 1983. Each test comprised three parts: multiple choice, written communication and oral examination. Each part was assigned a certain weight as a

percentage of a candidate's final score. Both examinations, however, produced "severe adverse impact for minorities." *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 621 F.Supp. 1225, 1227 (N.D. Cal. 1985).

A court-appointed expert reviewed the tests and found that "insufficient attention was paid to the issue of adverse impact." *Id.* at 1228. The expert concluded that the City did not explore alternatives, especially to the use of the multiple choice test, that "may have minimized such impact." *Id.* Accordingly, the Civil Service Commission revised the system by which the examinations' components were weighed in order to reduce the adverse impact. The multiple choice and written communication components of the exam were scored on a pass-fail basis; the oral component of the exam was made the sole ranking device. *Id.*

The district court approved the reweighing system as an appropriate means to remedy the adverse impact. *Id.* at 1233. The Ninth Circuit reversed this holding, however, finding that the reweighing was not "a carefully contoured affirmative action plan." *San Francisco Police Officers' Ass'n v. City and County of San Francisco*, 812 F.2d 1125, 1132 (9th Cir. 1987). Changing the weights of the exam components after the results were announced, the appellate court found, dramatically altered a candidate's ability to prepare effectively for the examination. *Id.* at 1132. Once the results were reported the "City was required either to validate its initial examination or, if it could not, to devise and administer an alternative selection procedure that did not have an adverse impact." *Id.* at 1133. The Ninth Circuit directed the City to discard the

results of the reweighed examinations and administer a new selection procedure. *Id.*

On rehearing, the Ninth Circuit refused to penalize the beneficiaries of the reweighing plan by removing them from their positions as Sergeants and Assistant Inspectors. Because the City had abandoned the promotional lists and the existing appointees would not be replaced, the Ninth Circuit dismissed the appeal as moot and withdrew the original opinion. *San Francisco Police Officers' Ass'n v. City and County of San Francisco,* 842 F.2d 1126 (9th Cir. 1988). On further rehearing, the Ninth Circuit reinstated its original opinion but declined to award any relief. *San Francisco Police Officers' Ass'n v. City and County of San Francisco,* 869 F.2d 1182 (9th Cir. 1988). This Court denied the POA's petition for a writ of certiorari. *San Francisco Police Officers' Ass'n v. City and County of San Francisco,* 493 U.S. 816 (1989).

3. The Current Dispute Over Promotions.

During the litigation over the 1983 examinations, the district court issued a "Supplemental Order" in October 1986 setting forth an accelerated schedule for examinations. This order required the administration of two sets of Sergeant and Assistant Inspector examinations: the first set by December, 1986, and the second set by December, 1988.

The continuation of litigation in the Ninth Circuit over the 1983 examinations, however, further postponed the administration of the revised examinations. By an order dated August 10, 1989, the district court directed the City to administer Sergeant and Assistant Inspector

examinations by December, 1989. The order also required the City to appoint 100 Sergeants and 60 Assistant Inspectors from the results of these examinations.

The City engaged outside testing experts who took extensive precautions to create valid examinations. The experts performed a detailed and thorough job analysis for each position. Based on these studies, the experts specifically constructed the examinations to minimize the possibility of adverse impact. Because the professional literature shows that written and multiple choice examinations tend to produce adverse impact, the test developers eliminated those components from the test designs. Instead, the examinations consisted of elaborate "assessment centers" in which candidates were required to perform the actual tasks assigned to Assistant Inspectors or Sergeants. For example, each Assistant Inspector candidate interviewed actors posing as witnesses; each Sergeant candidate counseled an actor playing the role of a subordinate officer.

Rather than require candidates to respond in writing, candidates' responses were tape recorded for scoring purposes. The only writing required by the examinations was the report writing actually required by each position. The audiotapes were graded by racially mixed groups of "raters." A statistical analysis was performed to insure that a rater's scoring did not vary on the basis of the race of the candidate. This analysis showed no such rater bias.

Despite the City's sedulous efforts, the 1989 examinations produced severe adverse impact with regard to minorities if the candidates were selected in rank order

strictly according to test scores. The City, however, proposed to use a "sliding band" as an alternative means to select candidates from the examination results.

4. The Sliding Band.

Before the 1989 examinations, the applicants had been informed that the City might use a "sliding band" to meet the goals of the Decree. Each candidate was given a brief explanation of the banding process that the City had used for two years to satisfy the requirements of a similar consent decree in the City's fire department. The City explained that "scores within a band are considered equivalent" because "persons in the band are more or less 'tied' for rank order." The candidates were also informed that if banding were used, "some consideration [would] be given to avoid adverse impact against minorities and women."

Based on fundamental statistical principles, the sliding band quantifies the imprecision inherent in employment testing. The "standard error of measurement" for any examination indicates the degree to which scores are influenced by measurement error. In theory, each candidate has a "true score" that is not influenced by the errors and chance factors present in examinations. A true score is defined as the average score that would be achieved over an infinite number of administrations of identical examinations. The true score would emerge as extraneous factors average out. The standard error of measurement defines the limits of variance around an observed score within which a candidate's true score would fall with a certain degree of probability.

The standard error of measurement is computed by using a common formula that relates the standard deviation of the scores actually produced by the examination to the reliability coefficient for the examination.[2] The result indicates a numerical range in which the differences between scores reflect, with a high degree of confidence, measurement error rather than actual differences in the knowledge, skills and ability of candidates.[3]

Scores that are separated by less than the width of the band are considered substantially equal for purposes of selection. Because the band is based on the relative difference between scores, it has a function described as "sliding." Once the candidate with the highest score within a band is selected, the band "slides" so that its upper limit rests on the highest score remaining on the list. The band then comprises all scores that are not separated by a statistically significant factor.

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[2] The standard error of measurement is computed by multiplying the standard deviation of scores from the examination times the square root of 1 minus the reliability coefficient (SEM = SD x $\sqrt{1-RXX}$). The standard deviation measures the amount of actual variance on either side of the mean score of a particular examination. The greater the variance of score distribution around the mean, the higher the standard deviation. On a normal, or standard, distribution, 95% of the scores fall within plus or minus two standard deviations from the mean score. The reliability coefficient measures the internal consistency among various components of the examination as a measure of relevant job qualifications.

[3] The City multiplied the standard error of measurement by a confidence factor of 1.96 to derive the final band width. Statistical theory teaches that a factor of 1.96 times the SEM will indicate the range in which a candidate's true score will fall with 95% probability.

For the tests in question, application of the formula produced narrow bands. Each examination was graded on a 100 point scale. The band for the Sergeant examination was 4.0 points; the band was 5.48 points for the Assistant Inspector examination.

When the parties failed to reach a negotiated solution, the City filed a motion for a declaratory judgment approving its proposal to use the sliding band. The City requested permission to make 15 Sergeant promotions in addition to the 100 promotions required by the Court's order. The first 100 promotions would be made in rank order to meet any expectations created by the district court's earlier orders. The additional 15 Sergeant promotions would be made using the band. The City also proposed to use the sliding band to appoint no more than 7 Assistant Inspectors in addition to 60 appointed in rank order.

The district court heard three days of expert testimony on the City's motion for declaratory relief. The City called an expert on statistics, Dr. Bernard Sisken, to demonstrate the validity of banding as a method of selecting candidates. Dr. Sisken testified that the City's proposal was an appropriate use of statistics to define reliable differences between the scores of candidates. The City also called two experts in psychometrics, Dr. Sheldon Zedeck and Dr. James Outtz, who agreed that the City's method of banding was substantially equally valid to rank order selection for purposes of the *Uniform Guidelines.*

The POA called two experts, Dr. Ingram Olkin, an expert on statistics, and Dr. Lawrence Meyers, an expert in psychometrics. Although they disagreed with the

City's interpretation, both POA experts agreed on the City's computation of the band and the concept of significant differences between scores as measured by the band.

As described above, the City's initial banding proposal relied on minority status as the sole criterion for selection of candidates whose scores fell within the same band. On June 6, 1991, the district court declared that the City's plan violated the restrictions on race conscious remedies set forth by this Court in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and by the Ninth Circuit in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989). (Pet. App. at 48a-59a) The district court recognized, however, that banding was an appropriate use of test scores and invited the City to submit a modified proposal that included other criteria. The Court urged the City to consider the approach accepted by the Second Circuit in *Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2nd Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 337 (1991). (*Id.* at 58a)

On June 28, 1991, the City proposed certain additional factors to select among candidates whose scores fell in the same band. On August 21, 1991, the district court issued the order approving the City's proposal. (*Id.* at 15a – 47a) The court specifically approved the City's calculation of a band for each examination based on the standard error of measure. (*Id.* at 31a) The court accepted the City's proposal to treat persons whose scores fall below the lower limit of a band as significantly less qualified than those persons whose scores are within the band. (*Id.* at 32a) The court further found that "the City's proposed selection criteria are legally sound." (*Id.* at 45a) These criteria include professional conduct, education,

training and experience as well as the Department's affirmative action goals. (*Id.* at 46a)

5. The Ninth Circuit Decision.

In an opinion by Chief Judge J. Clifford Wallace, a panel of the Ninth Circuit unanimously affirmed the District Court's order. *Officers for Justice v. Civil Service Comm'n*, 979 F.2d 721 (9th Cir. 1992) (Pet. App. at la-14a). The opinion noted that the district court had heard extensive expert testimony in support of the plan, and that the principle of statistical deviation underlying banding was approved in *Castaneda v. Partida*, 430 U.S. 482 (1977). 979 F.2d at 727. The Ninth Circuit specifically rejected the argument, advanced in the instant petition, that an employer is required by federal law to hire in strict rank order even when scores are not separated by a significant difference:

> The district court heard evidence that the test scores themselves are imprecise measurements of future job performance and that by banding the scores and considering secondary criteria in making promotion decisions, the City may increase the probability that the most qualified candidates will be promoted. The district court did not clearly err in finding that banding, as proposed by the City, is more valid, or at least "substantially equally valid" to rank order promotions.

Id. at 728.

The Court of Appeals also held that City did not violate equal protection or Title VII through the limited

use of race or gender as factors together with other relevant criteria to select candidates from within the band. The Court held that in light of the "historical context" of this litigation, the "City's admission of past discrimination" and the adverse impact of the examinations, there was a strong basis in the evidence to satisfy the standard for voluntary affirmative action under *United States v. Paradise*, 480 U.S. 149 (1987). 979 F.2d at 726.

The Court of Appeals rejected the POA's argument, also repeated in the petition, that Congress outlawed all forms of race conscious, affirmative action by enacting the Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act" or "Act")). The POA argued that such practices are prohibited by section 107 of the Act, which makes unlawful employment practices in which race or gender "is a motivating factor." The Ninth Circuit easily dismissed this argument, noting that section 116 of the Act exempts lawful affirmative action programs from the prohibitions in section 107.

REASONS FOR DENYING THE WRIT

The Ninth Circuit's decision reflects the unique factual history of this case. Rather than risk more intrusive forms of court-ordered relief, the City entered into the Consent Decree which mandates affirmative measures to overcome the discriminatory results of past practices. The appellate court approved the City's proposal to meet the terms of the Decree by using the sliding band as an alternative to rank order selection. The decision does not,

as petitioner asserts, require employers who have no similar history or legal obligations to use a sliding band to overcome adverse impact.

Petitioner argues that the decision is an "unwarranted federal intrusion" into the personnel practices of state and local agencies. The City, however, was never ordered to use the sliding band. The City sought court approval for its proposal as a form of voluntary affirmative action that was justified by the goals of the Consent Decree and supported by the evidence of past discriminatory practices which made the Decree necessary. The sliding band enabled the Police Department to consider a candidate's experience and disciplinary record, among other factors, in making promotions. What would be an unwarranted federal intrusion is the result petitioner seeks: a requirement that an employer hire in strict numerical order from the results of a valid, but imperfect, examination.

Petitioner's attempt to gain review of the decision on grounds relating to the 1991 Civil Rights Act is equally unavailing. Whether the Act applies retroactively has no bearing on the outcome; the Ninth Circuit held that the City's use of the sliding band under the unique circumstances of this case is lawful under the Act as well as under the law in effect before the Act was passed. Petitioner's claim that the Act outlaws affirmative action flies in the face of the statutory language and express Congressional purposes.

I. THE NINTH CIRCUIT'S APPROVAL OF THE SLIDING BAND AS A FORM OF VOLUNTARY AFFIRMATIVE ACTION WAS BASED ON EXTENSIVE EVIDENCE AND EXPERT TESTIMONY.

Petitioner's argument that the Ninth Circuit's decision is an improper intrusion into civil service procedures conflates two separate objections. First, petitioner asserts that the trial and appellate courts erred in the factual determination that candidates selected through the sliding band and candidates selected in strict rank order are equally qualified. Second, petitioner claims that the decision will cause other employers to adopt *"ad hoc"* procedures that will undermine merit based selection. These objections misrepresent the evidence before the trial court and the holding of the Ninth Circuit.

The City did not propose the sliding band as a method to select candidates whose qualifications would "equal" those of candidates chosen in strict rank order according to numerical scores. The City proposed to use the sliding band as a method that was "substantially equally valid" to strict rank order selection within the meaning of section 1607.3(B) of the *Uniform Guidelines.* The City presented the sliding band as a selection procedure that allowed the Police Department to consider other qualifications if differences in scores did not indicate reliable differences in ability.

As petitioner's own expert testified, if the predictive value of one selection method is not statistically significantly lower than another method, the methods are "substantially equally valid" within the meaning of section

1607.3(B) of the *Uniform Guidelines*. The sliding band proposal is based on this same concept of statistical significance. Candidates are treated differently only if their scores are separated by a statistically significant factor. If there is such a significant difference, the employer can assert, with a high degree of confidence, that the difference in scores will predict a difference in the actual performance of the job in question.

Test scores that are not significantly different -- test scores that fall within the band – cannot predict, with a high degree of reliability, differences in actual job performance. This view is commonly accepted in practice. As the trial testimony showed, many aptitude tests report the range of possible variance in a candidate's test score due to measurement error. Such reports discourage undue reliance on small numerical differences in scores. The traditional system of assigning letter grades to test results also reflects the view that small differences in numerical scores are not reliable for purposes of distinguishing among students.

Letter grades, percentile ordering and other methods of arranging scores into groups free employers from a rigid system in which any difference in a numerical score, no matter how small, would determine a decision about hiring or promotion. Civil service systems, for example, traditionally rely on the "rule of three" to give the appointing authority the discretion to choose among the top three scores on a list.

The sliding band affords a more precise use of test scores than methods such as letter grades or the rule of three that make arbitrary distinctions among test scores.

The rule of three, for example, permits an appointing authority to select the second highest score even when there is a statistically significant difference between the first and second score. This result would not occur through the use of the sliding band: scores are treated differently only when there is a difference between scores that indicates a reliable difference in the ability to perform the job. Thus, the sliding band preserves merit based selection with appropriate recognition of the imprecision and measurement error inherent in employment testing.

Under the sliding band procedure, if test scores do not indicate a reliable difference in ability, an employer may consider other factors that are related to reasonable objectives. The City proposed to consider work history, special experience and disciplinary records. Certainly these are reasonable factors, especially in light of the duties of a police officer. No court has ever suggested that such criteria violate federal law.

The City's procedure also permitted the Police Department to consider the goals of the Consent Decree in selecting candidates whose test scores indicate no reliable differences in ability. Such limited use of affirmative action was clearly justified, as the Ninth Circuit held, by the evidence of discrimination resulting from earlier reliance on unvalidated procedures and the City's failure to meet the goals of the Consent Decree. *Officers for Justice*, 979 F.2d at 726-27.

The Ninth Circuit agreed with the district court, which has overseen this litigation for twenty years, that

the Decree's prohibition on discrimination did not preclude the use of the sliding band. The Consent Decree's requirement that the City undertake good faith, affirmative measures to reach the goals of the Decree clearly contemplates forms of voluntary affirmative action such as the sliding band. *Id.* at 727.

In short, the sliding band is predicated on the notion, widely accepted in theory and practice, that insignificant difference in numerical scores cannot reliably predict differences in actual job performance. The City's use of banding to meet the goals of the Consent Decree was supported by the particular history and evidence in this case.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THIS AND OTHER COURTS REGARDING THE USE OF TEST SCORES.

Petitioner incorrectly suggests that the Ninth Circuit's decision contradicts the holdings of other courts regarding the use of test scores, the interpretation of consent decrees and the use of affirmative action to select candidates whose examination scores indicate no reliable difference in knowledge skills or ability. Petitioner, however, cites decisions that demonstrate no such conflict.

Petitioner relies on *Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 337 (1991), in support of the argument that banding is appropriate only for poorly designed, unreliable examinations. Petitioner argues that the Second Circuit approved banding because the City of Bridgeport

"could not show that the results of the examination were reliable enough to justify appointments in rank order." (Pet. at 13)

Petitioner misreads *Bridgeport Guardians*. In that case, the City of Bridgeport had established that the challenged exam was "content valid and justified by the City's business needs." 933 F.2d at 1148. Nevertheless, the plaintiffs "had sufficiently rebutted that evidence by showing that the City could have elected to use banding in order to alleviate the disparate racial effect of the examination without disserving its legitimate needs." *Id.* Thus, the Second Circuit approved the use of the sliding band for a reliable examination because the terms of a consent decree and the evidence of disparate impact and past discrimination justified that remedy.

Citing *Afro-American Patrolmen's League v. City of Atlanta*, 817 F.2d 719 (11th Cir. 1987), petitioner maintains that the Ninth Circuit's decision deprives nonminorities of enforceable rights under consent decrees. Petitioner maintains that the decision will act as a disincentive to public agencies to enter into settlements of Title VII actions.

Petitioner's reliance on *Afro-American Patrolmen's League* is also misplaced. In that case, the consent decree specifically forbade the City of Atlanta from engaging in affirmative, race conscious relief to meet the terms of a consent decree. The explicit terms of the decree required the City to validate examinations and hire from those examinations without respect to the race or gender of candidates. *Id.* at 724.

By contrast, the Consent Decree in the instant case imposes no restriction on the use of test results. As the Ninth Circuit noted, the Consent Decree contemplates the type of affirmative relief prohibited by the decree in *Afro-American Patrolmen's League*. The Ninth Circuit concluded that "the consent decree itself provides a proper rationale for race conscious promotions and serves as a valid defense against the [POA]'s reverse discrimination arguments." *Officers for Justice*, 979 F.2d at 727.

This Court has recognized that an employer is not bound by federal law to select the highest scoring candidate; selecting a lower scoring but highly qualified candidate is proper to meet legitimate business goals including the terms of a lawful affirmative action plan. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). The sliding band enabled the City to consider other lawful objectives in a procedure that gives more weight to examination scores than methods approved by other courts.[4]

It is ironic that petitioner argues that the Ninth Circuit decision constitutes an unwarranted intrusion into civil service systems and would discourage public entities from compromising Title VII actions by entering into

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[4] See *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 938 (1992) (approving promotions of lower scoring police officers); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1948 (1992) (promoting officers to satisfy consent decree); *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989) (city's affirmative action plan is a proper basis to promote lower scoring minority); *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986), *cert. denied sub nom., Cincinnati Firefighters v. Youngblood*, 480 U.S. 935 (1987) (consent decree based on statistical disparities justifies promotions of lower scoring minority candidates).

consent decrees. The City agreed to the Consent Decree to avoid the possibility of more drastic forms of court-imposed relief that might be justified after a finding of intentional discrimination. Far from constituting interference with a civil service system, the sliding band gives the appointing authority some measure of discretion to consider other qualifications of candidates while meeting the goals of a lawful consent decree.

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE 1991 CIVIL RIGHTS ACT PROVIDES NO BASIS FOR GRANTING THE WRIT.

Petitioner argues that the Ninth Circuit's decision presents two important questions regarding the interpretation of the 1991 Civil Rights Act. First, petitioner maintains that the decision should be reviewed to consider the question of the retroactivity of the 1991 Civil Rights Act. Second, petitioner maintains that the Ninth Circuit erred when it held that Congress did not outlaw affirmative action when it passed the 1991 Civil Rights Act. Neither argument presents appropriate grounds for granting the writ.

Petitioner claims that this case presents a "unique" opportunity to decide the issue of the retroactivity of the 1991 Civil Rights Act. This argument ignores the Ninth Circuit's actual holding. The appeals court held that it was unnecessary to reach the issue of retroactivity because it is clear that the provisions of the Act cited by the petitioner did not change the law governing the use of preferences in voluntary affirmative action. *Officers for Justice*, 979 F.2d at 725. Thus, the Ninth Circuit's decision

does not squarely present, for purposes of review by writ of certiorari, the question of whether the Act is retroactive: regardless of whether the law is or is not retroactive, the decision remains the same.

In the appeal to the Ninth Circuit, petitioner argued that the sliding band was prohibited by section 107 of the Act. Section 107 codifies the result in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that decision, a plurality of this Court held that a plaintiff in a Title VII action will prevail if she proves that an impermissible factor "played a motivating part in an employment decision." *Id.* at 250. The decision expressly provided that it did not apply to "the special context of affirmative action." *Id.* at 239 n.3.

Nothing in section 107 indicates any congressional purpose to apply the *Price Waterhouse* rule to the "special context of affirmative action." To the contrary, in section 116 of the Act, Congress stated that nothing in the Act was intended to disturb affirmative action that is lawful under existing case law. As the Ninth Circuit noted, petitioner's reading of the 1991 Act poses an internal inconsistency: Congress sought to protect affirmative action in section 116 while outlawing it in section 107. *Officers for Justice*, 979 F.2d at 725. Such a reading must be rejected.

"A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1981). It is a fundamental rule of statutory construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l*

Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986). In the instant case, petitioner argues that the 1991 Civil Rights Act, while addressing seven specifically identified Supreme Court decisions, also overturned two decades of law on affirmative action by implication. Petitioner simply cannot sustain its burden of showing the section 107 prohibits the otherwise lawful use of preferences to meet the goals of a consent decree.[5] Therefore, petitioner's arguments regarding the 1991 Civil Rights Act present no persuasive reason for review of the Ninth Circuit's decision.

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[5] Petitioner also argues that the Ninth Circuit's decision violates the ban on "race-norming" in section 106 of the Act. In "race-norming," candidates were assigned a numerical score in relation to the exam performance of persons in the same racial category. The final scores were used without regard to evidence of prior discrimination; employers often had no knowledge that the scores had been adjusted. As the legislative history demonstrates, this arbitrary practice was not a form of affirmative action designed to overcome past patterns of unlawful discrimination. See H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess. 65, *reprinted* in 1992 U.S. Code Cong. & Admin. News 694, 750-51.

The sliding band is clearly not "race-norming" or any form of score readjustment prohibited by section 106. Petitioner, moreover, did not properly raise the issue on appeal, and the Ninth Circuit declined to consider the question. *Officers for Justice*, 979 F.2d at 726. Accordingly, petitioner is precluded from raising the issue in its petition.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

DATED: March 4, 1993

Respectfully submitted,

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